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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 517

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,
Petitioner,

vs.

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Certiorari.

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Respondent.

BRIEF

Of Respondent in Opposition to Petition for Certiorari.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for certiorari raises, in substance, but two questions, although petitioner subdivides the alleged issues into four questions.

The questions:

1. Was the release executed by Ervin Camp properly rescinded on the ground of mutual mistake of fact on the part of Camp and his employer?

2. Was evidence of the charge made by an insurance company for an annuity without refund admissible in evidence?

The District Court and the Circuit Court of Appeals properly answered both these questions in the affirmative. An analysis of the petition discloses no basis for upsetting the findings and rulings of the two lower courts, and the petition for certiorari should be denied.

OPINIONS OF THE LOWER COURTS.

Thompson v. Camp, 163 Fed. 2d 396 (C. C. A. 6, August 11, 1947).

The statement of petitioner, headed as above (Petition for Certiorari and Brief, p. 13), is correct.

JURISDICTION.

The statement of petitioner as to the basis of jurisdiction (Petition for Certiorari and Brief, p. 8) is not challenged.

STATEMENT OF THE CASE.

Review by this Court of the facts is limited by the concurrent findings of the District Court and the Circuit Court of Appeals on the issue of mutual mistake vitiating the release. Much of petitioner's summary statement of matters involved (Petition for Certiorari and Brief, p. 2) is therefore irrelevant. However, in order that the statement may be accurate and complete there is added the following:

Dr. M. B. Hendrix was the only doctor who had treated Ervin Camp or examined him prior to the execution of the release (R. p. 465).

Mrs. Camp testified that she asked to have Dr. R. E. Semmes, one of the leading brain specialists of the South, called into consultation, but that Dr. Hendrix "said it was not any use to do that, he would call him in, but if he did he would have to move him from the hospital, and the Railroad would not be responsible for anything" (R. p. 63). As a consequence Dr. Hendrix continued in sole charge of the case (R. pp. 86-92).

The Dr. R. E. Semmes, whose services were requested by Mrs. Camp, was the same Dr. R. E. Semmes who testified for the plaintiff that Ervin Camp's death was caused by the original injury (R. pp. 104, 108, 109, 119), that Camp was not able to go back to work when he was released by Dr. Hendrix (R. pp. 109, 110, 118, 119, 121), and that his condition could have been relieved by an operation which would not have been dangerous (R. pp. 105, 106).

While Dr. Hendrix was employed by the Frisco Employees' Hospital Association, the president of the Association was the first operating officer and director of the Frisco System; the treasurer of the Frisco was also treas-

urer of the Association, and the general attorney of the Frisco was the general solicitor for the Association (R. pp. 476-477). Dr. Hendrix was also the local or divisional surgeon for the Frisco and examined on behalf of it all of the employees who applied for positions (R. pp. 459, 503, 504), and persons who had claims against the company were regularly referred to him for examination (R. pp. 457, 458). He was recognized as an employee of the Frisco since an annual pass on the lines was issued to him (R. p. 504).

Dr. Hendrix recognized his duty as an employee of the Frisco in that he followed the routine when he released an employee by notifying him that he must go to the Claim Agent and sign a release before he could go back to work (R. pp. 494, 495, 496, 498). Thus, even if there was any real relationship of patient and doctor between Dr. Hendrix and Ervin Camp it is obvious that Dr. Hendrix' loyalty was divided, and it could be easily found from the facts that he considered his primary loyalty to the Frisco. Clearly, under these circumstances Ervin Camp did not have the judgment or advice of an independent physician devoted solely to his interests. Although the full effect cannot be had from the printed record, even when read Dr. Hendrix' testimony discloses a brusqueness and impatience not indicative of any great interest in Camp's welfare.

It is a fair and indeed a necessary inference that Ervin Camp had a fixed determination not to execute any release so long as he had any reason to believe there would be future consequences from his injury. In his mind that was to be determined by the date he was released by the doctor to go back to work. Although approached several times by the Claim Agent prior to being released by Dr. Hendrix, he consistently refused even to make or sign any

statement as to the occurrence of the accident (R. pp. 80, 89, 425).

The effect of this was an agreement between Camp and the Claim Agent that nothing would be done about the settlement of Camp's claim until Camp had been assured by the doctor that he was well and able to return to work without danger of further interruption, and that then they would confer about a settlement. This being the situation, Camp received this assurance from the doctor on June 2, when the doctor "told him he was O. K., he could go back to work" (R. p. 65). Dr. Hendrix testified that under such circumstances it was not necessary to telephone the Claim Agent, but that it was his practice, and the inference from his testimony is that that practice was followed in this case. In any event, he told Camp that he was able to go back to work but could not do so until he saw the Claim Agent and signed a release (R. pp. 494-495). Ervin Camp having previously told the Claim Agent that he would not give a statement or execute a release until he had been assured by the doctor that he was well and able to go back to work, necessarily the effect of his stating to the Claim Agent that he was ready to see him, coupled with the routine ordinarily followed, put the Claim Agent on notice that Camp had been assured by the doctor that he was able to go back to work and there would be no further consequences of his injury. Mrs. Camp testified that when they returned from the doctor's office they found that the Claim Agent had left a call stating he wanted to see them (R. p. 65). Moreover, Ervin Camp expressly told the Claim Agent that the reason why he was ready to see him and settle his claim was that he had been assured by the doctor that he had recovered sufficiently to go back to work (R. pp. 427, 449, 450, 451, 452).

There can be no doubt but that Ervin Camp relied upon the doctor's assurance that he was O. K. and able to go

back to work, in executing the release. The fact that he had declined to take any steps toward this end prior to receiving this assurance by the doctor in itself is sufficient so to show.

It is to be borne in mind that the question is whether Ervin Camp relied upon the doctor's assurance and not what Mrs. Camp thought. The facts are that Camp accepted the assurance of the doctor and was guided by it, rather than by what he thought the over-anxiety of a loving wife. Mrs. Camp testified:

> "Q. Was there anything said about whether Mr. Camp could go back to work unless he signed a release?
>
> A. He told him he could not go back to work until he signed a release.
>
> Q. Now, previous to that time, the same afternoon, Dr. Hendrix had told him he was O. K., he was all right?
>
> A. Yes, sir.
>
> Q. He could go back to work?
>
> A. Yes, sir.
>
> Q. You really believed that?
>
> A. Yes, sir, we did.
>
> Q. That is why you were willing to talk to Mr. Westbrook?
>
> A. Yes, sir" (R. p. 67).

And, again, she said:

> "Q. And when this occurred, and when you talked with Dr. Hendrix, Dr. Hendrix said he would be O. K. or 'You are O. K., go back to work,' I believe you said, on direct examination, that you did not agree, and Mr. Camp did not agree, and that he was all right and able to go back to work?
>
> A. I didn't. Still, I thought the doctor knew what he was talking about" (R. pp. 93-94).

She further stated:

"Q. Now, you say that Dr. Hendrix told him he was O. K., to go back to work, but you didn't think he was?

A. No, sir.

Q. But Mr. Camp did what Dr. Hendrix said, and not what you said, is that right?

A. That is right" (R. p. 95).

It is obvious from this testimony that while Mrs. Camp was fearful of future developments, Mr. Camp was reassured and acted upon the advice of the doctor. The situation had been the same when Dr. Hendrix had told Mr. Camp he could return home. As to this, Mrs. Camp testified:

"A. It had to some extent, but it had never completely cured up.

Q. And you didn't think, at the time he went home, he was able to go home?

A. No, sir. I asked the doctor not to release him.

Q. Did he want to go home?

A. I suppose so. He relied on what the doctor told him.

Q. I know, but, I say, did he want to go home, himself?

A. Certainly, if Dr. Hendrix thought he was able, well enough to go home" (R. pp. 86-87).

So on this occasion also Ervin Camp accepted the expert advice of the doctor instead of being influenced by the solicitude of his wife.

In testifying Dr. Hendrix left no doubt but that he assured Camp that he was able to go back to work (R. p. 499). Moreover, he stated that, if he could have in any sense foreseen what actually happened, he would not have advised Camp to go back to work (R. p. 509). The doctor admitted that both Mr. and Mrs. Camp were guided by his advice, saying:

"Q. I simply want to ask you whether Mr. and Mrs. Camp did what you told them to, relied on what you said; did they, or not?

A. They were very cooperative.

Q. Did what you told them to and relied on what you said, so far as you know, didn't they?

A. Yes, and I was very sincere and cooperative with them, tried to do everything I possibly could for him and every other Frisco employee I have ever treated" (R. p. 512).

There is no doubt left in the record but that the Claim Agent, Westbrook, also mistakenly believed and acted on the mistaken belief that Camp was well and able to go back to work and there would be no future results of his injury. Any other explanation of the settlement would indicate fraud on the part of Westbrook, and this is expressly negatived by the verdict of the advisory jury and the finding of the Judge of the District Court.

The situation of the parties clearly indicate that Westbrook acted on that belief. Ervin Camp had declined to settle until he was assured he was well and able to go back to work, and Westbrook had agreed to wait until this time. Therefore, the mere negotiating of the settlement indicated a belief on the part of both of them that Camp was well and able to return to work. Westbrook himself expressly testified that Camp had told him he was ready to talk settlement because he had been released by the doctor, told he was O. K. and able to go back to work, and that he, Westbrook, believed and acted on this (R. pp. 449-452). There was no discussion of the possibility of future consequences from the injury and no suggestion that Ervin Camp was agreeing to take a chance on future developments. The settlement was based on the fact that he had been released by the doctor, was O. K. and able to work.

Westbrook was a licensed attorney and especially skilled in employers' liability cases (R. pp. 441-442). It is true that he stated something to the Camps about lack of liability (R. pp. 66, 70). Camp had consulted no attorney and was represented by none. It is also true that the amount paid in full for the release (Five Hundred Dollars) was, according to Mrs. Camp, substantially what Ervin Camp would have earned with overtime (R. p. 68). Westbrook calculated the lost time at $324.83 and testified that this was one of the controlling elements of the settlements (R. p. 453). A fair inference from Westbrook's testimony is that he did not expect Camp to lose any further time and was making a settlement entirely on that basis.

It is true that Mrs. Camp stated that her husband was still having headaches at this time, but there is nothing in the record to indicate that either she or her husband realized that this was any prolongation of a serious condition or amounted to anything more than discomfort (R. pp. 86, 87, 93, 94). They were entitled to conclude this because they revealed these facts to Dr. Hendrix, and he stated that, notwithstanding them, Camp was able to return to work (R. pp. 75, 93).

The District Judge approved the verdict of the advisory jury finding mutual mistake of fact, and found as a fact that the release was made and given as the result of mutual mistake of fact (R. pp. 590, 592). The Circuit Court of Appeals, in its opinion, made concurrent findings to the same effect (R. pp. 605 et seq., passim, especially p. 611).

ARGUMENT.

THE RELEASE EXECUTED BY ERVIN CAMP WAS PROPERLY RESCINDED ON THE GROUND OF MUTUAL MISTAKE OF FACT ON THE PART OF CAMP AND HIS EMPLOYER.

Applicable Rule of Law.

The validity of a release executed by a railroad employee covered by the Federal Employers' Liability Act is governed by Federal law. **Wade Garrett v. Moore-McCormack Co., Inc.**, 317 U. S. 239, 87 L. Ed. 239; **Ricketts v. Pennsylvania R. Co.**, 153 Fed. (2d) 757 (C. C. A. 2).

In this case the issue of the validity of the release was tried and determined on the theory that the burden was on the respondent to produce "clear, unequivocal and convincing" proof that the release was made and given through mutual mistake of fact (R. pp. 542, 575).

That a different rule might apply and that the responsibility should rest upon petitioner to sustain the release, rather than upon respondent to overcome it, is strongly suggested by, and might flow from, **Wade Garrett v. Moore-McCormack Co., Inc.**, supra. Especially pertinent in extending the "admiralty rule" to non-maritime torts redressed by Federal law is the suggestive comment of this Court in footnote 17 of the opinion in the **Garrett case** (317 U. S. at p. 248, 87 L. Ed. at p. 245). The *ratio decidendi* of **Duncan v. Thompson**, 315 U. S. 1, 86 L. Ed. 575, might well lead to a conclusion that a railroad employee asserting rights under the Federal Employers' Liability Act should stand no lower on the ladder of judicial protection than an injured seaman seeking recovery under the Jones Act or similar acts.

But even on the trial theory in this case that the burden was on respondent to overcome the release by exceptional

evidence, that burden was successfully carried in the instant case.

Scope of Review.

The jury, acting in an advisory capacity, found that the release was executed as a result of mutual mistake (R. p. 573). The Court, acting independently, not only approved this finding but expressly found "that the release referred to in the proof was made and given as the result of mutual mistake of fact" on the part of Ervin Camp and the defendant (R. p. 592). The Circuit Court of Appeals made concurrent findings in accord with those of the District Judge, as well as ruling that under Rule 52 (a) of the Federal Rules of Civil Procedure, the finding of the District Judge was not "clearly erroneous" (R. pp. 610, 611).

Under the "well-established rule" of this Court, the concurrent findings of the courts below on these matters will be accepted by this Court "unless clear error is shown." **Just v. Chambers**, 312 U. S. 383, 385, 85 L. Ed. 903, 905; **Page v. Arkansas Natural Gas Corp.**, 286 U. S. 269, 271, 76 L. Ed. 1096, 1098; **Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks**, 281 U. S. 548, 558, 74 L. Ed. 1034, 1040.

The concurrent findings of the courts below effectively dispose of each and every element entering into the nonvalidity of the release: representation of fact, mistake, reliance. Not only is there no "clear error" in such findings, but ample, overwhelming evidence to support the correctness of the conclusions reached by both lower courts that the release was executed because Ervin Camp and petitioner's agent mistakenly believed that Camp was OK and able to go back to work. In this connection it is to be borne in mind that Dr. Hendrix was actually acting in a

dual capacity. Even if he be considered Ervin Camp's physician because he was employed by the Association (a question we shall hereinafter discuss) he was also representing the interest of the petitioner, not only generally but, in this particular case, by cooperating with the Claim Department. Therefore, as representative of both parties, if he was mistaken (as in fact he was) as to Camp's condition, this itself amounted to mutuality of mistake.

The record, however, goes much further. It clearly shows that Ervin Camp consented to execute the release only because of Dr. Hendrix's statement that he was OK and able to go back to work; he repeatedly declined even to discuss the matter until he received that assurance; when he received it he immediately acted upon it; the amount of the settlement related only to the time lost up to the date the release was executed. There is every indicium that Camp refused to deal in possibilities in regard to the extent of his injuries and only consented to execute a release when he was definitely informed that no further consequences were to be anticipated.

DR. HENDRIX' STATEMENT THAT OF A PRESENT EXISTING FACT AND NOT A MERE MATTER OF OPINION.

It is not strongly insisted by the petitioner that the parties did not mistakenly act upon the statement of Dr. Hendrix. The real insistence is one of law—that this statement of Dr. Hendrix was not the statement of a present existing fact but a mere expression of opinion and therefore cannot be considered a mutual mistake which justifies the avoidance of the release. Before we discuss the law we emphasize that under the facts it clearly could be found that this was a statement of a present fact. Dr. Hendrix told Ervin Camp "he was OK, he could go back to work." No expression in the English language is more expressive or better comprehended, both by English-speaking peoples and others throughout the world, than the ex-

pression "OK". It is the one American expression which all peoples understand. H. L. Mencken's **American Language**, pp. 205-208, and **Supplement One** to same, pp. 269-279. "Of all Americanisms 'OK' has been the greatest success. It has been borrowed by virtually all civilized tongues and also by many lower down the scale." Ibid, p. 276. "OK" is not only expressive but as applied to an individual its meaning is unmistakable. See **Words and Phrases**, Permanent Edition, Vol. 29, p. 399, et seq. Under the circumstances it meant that Camp was well and was able to go back to work. It did not necessarily indicate that he would not have future discomfort; it did unequivocally mean that he was cured and would be able not only to go to work but to continue his work. It was therefore no mere expression of opinion but a statement of fact by the doctor. Under the authorities such a statement clearly is the basis for avoidance of a release on the ground of mutual mistake.

CASES HOLDING THAT SUCH A STATEMENT AS THAT MADE BY DR. HENDRIX IS PROPER BASIS FOR AVOIDANCE OF RELEASE ON THE GROUND OF MUTUAL MISTAKE.

Whatever doubt there may formerly have been as to the rule, under present-day authorities there can be no question but what a release induced by such erroneous statement as that made by Dr. Hendrix is voidable on the ground of mutual mistake. One of the leading cases is **Lumley v. Wabash R. Co.**, 76 Fed. 66 (C. C. A. 6). In that case one who was traveling as an attendant to a carload of horses was injured as a result of the negligence of the railroad. He was attended by the company surgeon who found two injuries, contusion of the forehead and a fracture of the right arm. There was complaint of pain in the shoulder but the surgeon assured the injured man that this "was due to the broken arm and was wholly 'sympathetic.'" The surgeon told the claimant and the claim agent "that the fracture would be entirely well in about

eight weeks" and that the claimant would be able to resume his daily occupation "in not to exceed eight weeks at the very outside." Plaintiff's lost wages for this period would have been about $64, and settlement was made and release was executed for the consideration of $75. It later developed that the plaintiff's right shoulder was dislocated and fractured. The lower court sustained a demurrer to a bill in equity to set aside this release on the ground of either fraud or mistake. This Court, in an opinion by Judge Lurton, reversed the lower court and held the bill sufficient. The substance of the holding was that if the defendant's surgeon knew or suspected the injury to the shoulder and failed to reveal this to the injured man, this amounted to a fraud; but if he was in good faith mistaken in making his statement as to the injured man's condition, this amounted to a mutual mistake. The Court held either sufficient to avoid the release.

In the **Lumley** case it was said "that the terms of the release in question are sufficiently comprehensive to prevent a recovery for any of the injuries which may have been sustained by the complainant," but that from the allegations it appeared that the parties had taken into consideration only the injuries which the surgeon found and the time which the injured man would probably lose as a consequence thereof. Judge Lurton in disallowing the contention of the defendant that the statements of the physician were merely expressions of opinion, said:

> "To say to him that the pain of which he complained was sympathetic and was caused by the fracture below his elbow, was a positive misrepresentation of the truth, and an operative fraud" (p. 70).

It is to be noted that clearly the statements made in the **Lumley** case are in the same category as those made by Dr. Hendrix in the case at bar. It is impossible to distinguish the cases except to say that in the **Lumley** case

the doctor predicted when the injured man would be able to go back to work while in the case at bar Dr. Hendrix pronounced that Ervin Camp was then able to go back to work. If any distinction, therefore, is to be made, there is stronger ground for avoiding the release in the case at bar than there was in the **Lumley** case.

The question was reconsidered and the **Lumley** case reviewed and approved in **Southern Ry. Co. v. Clark**, 233 Fed. 900 (C. C. A. 6).

The opinion of Judge Sanborn in **Chicago & N. W. Ry. Co. v. Wilcox**, 116 Fed. 913 (C. C. A. 8), is strongly relied upon by petitioner. In that case one of the issues of fact was whether the defendant's doctor had told an injured plaintiff that she would be well within a year or whether he had merely told her that she would not be able to do anything for at least a year and "that there was no certainty of her ever entirely recovering." The Circuit Court of Appeals of the Eighth Circuit unanimously held that the doctor gave the injured plaintiff no assurance as to her recovery and for that reason the release could not be avoided. Judge Sanborn, however, went further and held that even if the doctor made the statement to the plaintiff that she would be well within a year this was a mere expression of opinion which could not be the basis of avoidance of the release. From this Circuit Judge Thayer dissented, saying:

> "I do not concur in the view which is further expressed in the opinion in chief, that the statement imputed to Dr. Thompson, even if it was made and relied upon, would not suffice to invalidate the settlement because it was a mere opinion or prophecy. I conceive that if Dr. Thompson, for the purpose of inducing a settlement favorable to the defendant company, did advise the complainant that she would doubtless be well within a year, when he had no expecta-

tion that she would recover, and the complainant, in reliance upon his superior professional knowledge, was thereby induced to make the settlement, it might and ought to be vacated by a court of equity, notwithstanding the fact that the advice so given was in the nature of an opinion or prophecy." (pp. 919-920.)

In **Lion Oil Refining Co. v. Albritton,** 21 Fed. (2d) 280 (C. C. A. 8), the Eighth Circuit Court in effect receded from the extreme position it had taken in the **Wilcox** case. While in the opinion Judge Kenyon cited the **Wilcox** case as authority for the rule that the proof must be clear, unequivocal and convincing, he held that facts no stronger than the plaintiff's testimony in the **Wilcox** case were sufficient to justify the avoidance of the release. The defendant's doctor had told the plaintiff, who was burned by a backfire from a furnace, that his "eyes had not been injured by the burn." Relying upon this statement the plaintiff made a settlement for a sum "being largely compensation for lost time." It later developed that the optic nerve of one of the plaintiff's eyes had been affected. The Court held that if the statements of the doctor were fraudulently made the release was avoidable on the ground of fraud, and if innocently made the release would be set aside on the ground of mutual mistake.

Among other courts that have disapproved the **Wilcox** case is the Second Circuit, speaking through Judge Learned Hand in **Scheer v. Rockne Motors Corporation,** 68 Fed. (2d) 942 (C. C. A. 2). In that case the defendant who obtained the release told the injured plaintiff "that her injuries were not serious and that she would be about again in a few weeks." The plaintiff's own doctor "testified that though he told her that her back was broken, he, too, assured her that she would be able to leave the hospital in a few weeks." The argument was made that

these were mere expressions of opinion. Judge Hand, however, held "there was evidence to justify setting aside the release." He added:

> "These assurances are much more positive than those before the court in Chicago & N. W. Ry. Co. v. Wilcox, 116 Fed. 913."

It is difficult to agree with this statement in view of the fact that the plaintiff in the **Wilcox** case had testified that the doctor made to her the positive statement "that there was no doubt but that she would be well in a year." Judge Hand, however, did not rest the matter there, but still speaking of the **Wilcox** case, added:

> "The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent. Steele v. Erie R. R. Co. (D. C.), 54 F. (2d) 688; affirmed 54 F. (2d) 690 (C. C. A. 2). Cf. Great Northern Ry. v. Fowler, 136 F. 118 (C. C. A. 9)." (p. 945.)

Judge Hand continued:

> "There is indeed no absolute line to be drawn between mistakes as to future, and as to present facts. To tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood. Of course, the sufferer may be told all the facts and the forecast put to him strictly as such; so that he will know it to be no more than the declarant's prognosis. We may assume arguendo that that would not support a rescission" (p. 945).

Those who know Judge Hand and have followed his opinions fully realize the precision of his language. It is

noteworthy that in the quotation above given he puts the situation thus:

> "It is ordinarily more than a forecast; it is an assurance as to his present condition, and so understood."

Then with entire accuracy he says:

> "Of course, the sufferer may be told all the facts and the forecast put to him strictly as such; so that he will know it to be no more than the declarant's prognosis."

In these two sentences Judge Hand correctly states all the law. In the absence of a careful explanation to a claimant that future developments are uncertain and that he is being given only an opinion which may or may not be correct, a statement that he is OK or able to go back to work, or any such similar statement, is one as to a present fact.

If the test inherent in this language is applied, all the cases except possibly the discredited **Wilcox** case can be entirely reconciled.

In **Atlantic Greyhound Lines v. Metz**, 70 Fed. (2d) 166 (C. C. A. 4), the Court, speaking through Judge Parker, held that notwithstanding the fact that a release "was general and broad enough to cover all injuries sustained," it was avoidable on the ground of mutual mistake when "both plaintiff and the claim agent were entirely ignorant of the serious abdominal injuries which plaintiff had sustained."

The question came before the Circuit Court of Appeals for the Ninth Circuit in **Great Northern Ry. Co. v. Fowler**, 136 Fed. 118 (C. C. A. 9). The defendant's physician in that case diagnosed the plaintiff's injuries and stated that "he was practically well and would be able to go to work in a week or two." Thereupon settlement was made which

consisted largely of an amount sufficient to compensate plaintiff for doctor's and nurses's bills and lost wages. The doctor much more nearly expressed an opinion in that case than in the case at bar, because in a blank which he filled out, the following questions were answered:

> "Will any permanent injury or deformity result? If so, what?—I think not."

Again:

> "How long will the plaintiff be disabled?—He will probably be able to work in two weeks."

It will be noted that in the **Fowler** case the doctor merely stated that he thought no permanent injury or deformity would result, whereas Dr. Hendrix told Camp that he was OK. It is also to be noted that in the **Fowler** case the doctor did not state that the plaintiff was then able to go back to work but merely stated that he would "**probably** be able to work in two weeks." (Emphasis supplied.) In the **Fowler** case it developed that the plaintiff had an injury to his brain and nervous system which was serious and resulted in traumatic neurosis. The Court said that

> "The evidence in the case convinced the trial court, as it convinces us, that the settlement was made under a mutual mistake of both parties thereto as to the nature and extent of the appellee's injuries" (136 Fed. at p. 120).

Judge Gilbert, who wrote the opinion, cited the **Lumley** case, saying:

> "A case directly in point is Lumley v. Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60, decided by the Circuit Court of Appeals for the Sixth Circuit" (136 Fed. at p. 121).

Judge Gilbert also adopted the following language of **Houston & T. C. R. Co. v. Brown,** 69 S. W. 651 (C. C. A. of Texas), in disallowing the contention that the doctor's statements were a mere expression of opinion:

> "We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart was a mere expression of opinion. It was more than an opinion. It was the statement of a fact. * * * It is true, this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside, if he was misled by the statement, and executed the release, believing the statement was true. In such a case, innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false" (p. 652).

The Ninth Circuit went even further in **Robert Hind, Limited, et al. v. Silva,** 75 Fed. (2d) 74 (C. C. A. 9). In that case the release, while general, discharged the defendant "from all claims, demands, damages, actions or causes of action, on account of injuries resulting, or to **result,**" from the action. (Emphasis supplied.) The injured person was attended by "his own physician." This physician testified there was evidence of a bruise over the right sacroiliac region and other minor abrasions. Other than that he found no serious injury. The plaintiff's physician was informed by his doctor that he was able to return to work, and he did so. The amount paid for the release represented the wages lost by the plaintiff as a result of his disability. It later developed that the plaintiff was much more seriously injured because of a recurrence of

the original back injury. The argument made by the defendant, as here, was

> "* * * that the evidence shows there was no mistake as to the facts of the injury, that is, as to what injury was suffered, and argues 'that the only situation that justifies cancellation of a release on the ground of mutual mistake of fact is where there was an unknown injury that was not taken into consideration at the time of the settlement.' The only mistake in this case, continues appellant, 'was as to the seriousness, or severity, of the injury,' and, it is argued, 'such a mistake is a mistake of opinion or prophecy which does not justify cancellation of a release' " (p. 77).

The Court disallowed this argument, holding that

> "The release was executed under a mutual mistake as to a present and existing fact which it is uniformly held justifies the cancellation of a release. * * * A statement by a physician that a patient has fully recovered from an injury received in an accident is a representation concerning an existing fact. * * * It was not a mistake in prophecy or opinion or in a belief relative to an uncertain future event" (p. 77).

While holding that the case he was dealing with was not such a case, Circuit Judge Wilbur recognized, as did Circuit Judge Learned Hand in **Scheer v. Rockne Motors Corporation**, supra, that it was possible when such an intention existed, for the parties to compromise in circumstances under which the person executing the release voluntarily assumed the risk of future developments. In this connection he said:

> "It was not in reality a compromise entered into on account of uncertainty involved as to the future effect of the accident" (p. 77).

Steele v. Erie R. Co., 54 Fed. (2d) 688 (D. C. W. D. N. Y.), was a case tried under the Federal Employers' Liability Act by the judge without a jury. It was held that there was a mutual mistake when the attending physician stated to the plaintiff "that he would be relieved of his injury in a couple of weeks and that there was no reason to fear any complications," whereas in fact the period of disability was much longer. The Court distinguished the facts in that case from those involved in the **Wilcox** case and cited with approval the **Lumley** case and **Great Northern R. Co. v. Fowler**, supra. Particular stress was laid upon the fact that the amount of the settlement was consonant with the shorter but not with the longer period of disability. This case was affirmed by the Circuit Court of Appeals for the Second Circuit in 54 Fed. (2d) 690 (C. C. A. 2).

See also **Montgomery Ward & Co. v. Callahan**, 127 Fed. (2d) 32 (C. C. A. 10); **Tulsa City Lines, Inc., v. Mains**, 107 Fed. (2d) 377 (C. C. A. 10).

The cases from the State courts of last resort are too numerous to permit extended quotations from all of them. We shall refer to a few, for illustrative purposes, giving the language which was held to be a statement of a present fact, and cite the others:

"Her injuries were very slight and that she would be well and at work within two or three days." **Clark v. Northern Pacific Ry. Co.**, 36 N. D. 503, 162 N. W. 406. "The physician had told him (the plaintiff) to go to work and to work his hand, and it would be all right." **Wolf v. Cudahy Packing Co.**, 105 Kan. 317, 182 Pac. 395. Language almost identical with that here involved: "He was all right and OK to go to work; for him to see Mr. Carlson (defendant's claim agent) and get things straightened up and go to work." **Rider v. Kansas City Terminal Ry.**

Co., 112 Kan. 765, 212 Pac. 678. "That he was all right, he can go back to work." **Koshka v. Missouri Pac. R. Co.**, 114 Kan. 126, 217 Pac. 293. "That there was nothing seriously wrong and that he would be all right in thirty days." **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406. "That his foot would be well in two or three weeks." **Missouri, K. & T. Ry. Co. of Texas v. Maples**, 162 S. W. 426 (C. C. A. of Texas). "We think the statement that appellee's leg 'was all right and was well' ought not to be construed as the opinion merely of the surgeon." **Misouri, K. & T. Ry. Co. of Texas v. Haven**, 200 S. W. 1152 (C. C. A. of Texas).

See also **St. Louis & S. F. R. Co. v. Richards**, 23 Okl. 256, 102 Pac. 92; **Ladd v. Chicago, R. I. & P. Ry. Co. et al.**, 97 Kan. 543, 155 Pac. 943; **Chicago, R. I. & P. Ry. Co. v. Rogers**, 60 Okl. 249, 159 Pac. 1132; **Smith v. Kansas City**, 102 Kan. 518, 171 Pac. 9; **Bidnick v. Armour & Co.**, 113 Kan. 277, 214 Pac. 808; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen**, 112 Okl. 256, 241 Pac. 188; **St. Louis Southwestern R. Co. v. Thomas**, 244 S. W. 839 (C. C. A. of Texas).

Rationale of the Decisions.

From the beginning the courts almost without exception have recognized that it was inequitable to sustain releases taken under circumstances similar to those existing in the case at bar.

A great many of the early cases invalidated such releases by extending the doctrine of fraud to cover such situations. Some held that even though the statement that the plaintiff was well or would soon be well was innocently made, this was constructive fraud, or fraud in law. **Clark v. Northern Pacific Ry. Co.**, 36 N. D. 503, 162 N. W. 406; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen**, 112 Okl. 256, 241 Pac.

188; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples,** 162 S. W. 426 (C. C. A. of Texas); **Missouri, K. & T. Ry. Co. of Texas v. Haven,** 200 S. W. 1152 (C. C. A. of Texas). Others made the statement of the doctor that of the defendant, when it was repeated to or adopted by the claim agent. **Lumley v. Wabash R. Co.,** 76 Fed. 66 (C. C. A. 6); **Southern Railway v. Clark,** supra; **Scheer v. Rockne Motors Corporation,** supra; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples,** 162 S. W. 426 (C. C. A. of Texas).

In one instance at least, in holding the release avoidable, the Court held that a doctor who represented an association such as the one mentioned in this record, but who had a pass given him by the railroad company, and who reported to the claim office of the company, was in fact the defendant's physician and not that of the plaintiff, so that the defendant was responsible for any representations made by him. **Missouri, K. & T. Ry. Co. of Texas v. Haven,** 200 S. W. 1152 (C. C. A. of Texas).

Cases of this nature show the effort of the court to arrive at the justice of the situation by an extension of the doctrine of fraud.

Most of the later cases, however, set aside the releases on the ground of mutual mistake. Some of these then proceed on the theory that the release in question did not purport to cover the injury which later developed. Others make a distinction between cases where the later injury had not been discovered at the time the release was originally taken, and cases where the subsequent developments were merely unexpected and unanticipated consequences of the original injury. **Southern Railway v. Clark,** supra; **Lumley v. Wabash R. Co.,** supra; **Scheer v. Rockne Motors**

Corporation, supra; **Lion Oil Refining Co. v. Albritton,** supra.

The most recent and best considered cases, however, squarely meet the issue by holding that a statement made by a doctor (such as that of Dr. Hendrix) is without more a statement of a present existing fact. (See cases cited and discussed supra.) In this connection both fraud and mistake cases are in point in determining the basic question of whether such a statement is of a present fact or is merely an expression of opinion as to the future. They differ only in the effect given the statement. If it is knowingly incorrect, fraud is present, while if it is innocently made and acted upon by both parties, there is clearly a mutual mistake (**Lumley v. Wabash R. Co.,** supra; **Lion Oil Refining Co. v. Albritton,** supra; **Great Northern R. Co. v. Fowler,** supra; **St. Louis-San Francisco Ry. Co. et al. v. Cauthen,** 112 Okl. 256, 241 Pac. 188; **Atchison, T. & S. F. Ry. Co. v. Peterson,** 34 Ariz. 292, 271 Pac. 406), even in those jurisdictions which do not go so far as to hold that such an innocent misrepresentation is constructive fraud or fraud in law.

When relief is sought upon the ground of mutual mistake it is, of course, immaterial whether the doctor is the physician of the plaintiff or the defendant, if his innocent misstatement is the cause of the mutual mistake (**Scheer v. Rockne Motors Corporation,** supra; **Robert Hind, Limited, et al. v. Silva,** supra), and inasmuch as the mutual mistake invalidates the entire agreement it is unimportant whether the undiscovered injury is distinct from the injury of which the parties knew or is a subsequent unexpected and more serious development of the known injury. **Scheer v. Rockne Motors Corporation,** supra; **Lion Oil Refining Co. v. Albritton,** supra; **Great Northern R. Co. v. Fowler,** supra; **Robert Hind, Limited, et al., v. Silva,** supra; **Steele v. Erie Railroad Co.,** supra; **Wolf v. Cudahy Pack-**

ing Co., supra; **Rider v. Kansas City Terminal Ry. Co.**, 112 Kan. 765, 212 Pac. 678; **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406; **Missouri, K. & T. Ry. Co. of Texas v. Maples**, 162 S. W. 426 (C. C. A. of Texas); **Missouri, K. & T. Ry. Co. of Texas v. Haven**, 200 S. W. 1152 (C. C. A. of Texas).

For the same reason it becomes unnecessary for the plaintiff to contend that the release does not purport to cover the new development. Since the entire release falls, it is immaterial what it purports to cover. **Lumley v. Wabash R. Co.**, supra; **Atlantic Greyhound Lines v. Metz**, 70 Fed. (2d) 166 (C. C. A. 4).

The language of the release is considered only as a circumstance tending to show the intention of the parties. While unexplained, such a statement as that of Dr. Hendrix is of a present existing fact, it is open to the defendant to prove that neither it nor the plaintiff were misled to act by a mistaken reliance upon the correctness of the statement, but that the plaintiff clearly intended to take the risk of all future developments. In this connection the language of the release is pertinent (e. g., **Sitchon v. American Export Lines**, 113 Fed. [2d] 830 [C. C. A. 2]), although not controlling, for the question is one of fact to be determined from all the evidence; and even though the release recites that it is not obtained in reliance upon a statement or representation by any doctor, this is not conclusive upon the plaintiff's right to avoid it. **Bidnick v. Armour & Co.**, 113 Kan. 277, 214 Pac. 808; **Atchison, T. & S. F. Ry. Co. v. Peterson**, 34 Ariz. 292, 271 Pac. 406. See generally 13 **Indiana Law Journal** 590; **Wigmore on Evidence**, Sec. 2416; 28 **Columbia Law Review** 893; **Restatement of Contracts**, Sec. 504, Illus. 4.

Applying these principles to the instant case it clearly appears:

Doctor Hendrix' statement that Camp was O. K. and able to go back to work was the statement of a present existing fact. As we have already pointed out in our statement of the case and argument heretofore made, this statement, although erroneous, was accepted and acted upon by both parties and was the producing cause of the release, which thus was executed as the result of a mutual mistake. Under the rule of **Missouri, K. & T. R. Co. v. Haven,** supra, Dr. Hendrix (who disclosed a primary loyalty to the defendant) could have been held to be its employees. This, however, is immaterial inasmuch as mutual mistake is the question involved. It is equally unimportant whether the unexpected future development was a distinct injury from the one known, or a development that had been negatived by the statement of the doctor, and whether the language of the release is broad and general enough to cover future developments. While these things may be considered in determining whether Camp and the Claim Agent were settling as a result of the statement of the doctor that Camp was O. K. and able to go back to work, or were settling with the conscious recognition on the part of Camp that he was not O. K. and not able to go back to work, and was taking the risk of any future developments, the entire evidence shows that the advisory jury, the District Judge and the Circuit Court of Appeals were well warranted in finding, regardless of both of these facts, that the settlement was induced, both on the part of Camp and on the part of the Claim Agent, by Dr. Hendrix' statement that Camp was O. K. and able to go back to work. This being true, the case is obviously one of mutual mistake and the entire release, regardless of its language, must fall. Therefore, it cannot possibly be said that it was "clear error" for the advisory jury, the District Judge and the Circuit Court of Appeals so to find; indeed, it is difficult to see how any different conclusion could be reached.

EVIDENCE OF THE CHARGE MADE BY AN INSURANCE COMPANY FOR AN ANNUITY WITHOUT REFUND WAS ADMISSIBLE IN EVIDENCE.

The petition for certiorari seeks review of the action of the Circuit Court of Appeals in affirming the action of the District Court in receiving evidence of the charge made by an insurance company for an annuity without refund applicable to a person of the approximate age of Ervin Camp.

It is our understanding that an annuity is actually the present cash value of payments distributed over a term of years—this and nothing more. Mrs. Camp testified that Ervin Camp was thirty-three years of age and was earning about $250.00 a month (R. pp. 57-59). His life expectancy was 33.2 years. Mrs. Camp further testified that practically all of the earnings of Camp were necessary for the support of his family (R. p. 59).

The evidence complained of was that of the witness Pritchett of the cost of an annuity of $3,000.00 a year without refund for a man forty years of age (R. pp. 285 et seq.). The total cost of such an annuity was stated to be $74,520.00 (R. p. 287). The verdict of the jury in favor of respondent was in the amount of $35,000.00 (R. p. 572).

There are four conclusive answers to this unsubstantial point of evidence asserted by petitioner:

1. The evidence was properly admitted. See the authorities cited by the Circuit Court of Appeals in its opinion on this point (R. pp. 613-14), especially **Vicksburg and Meridian R. Co. v. Putnam**, 118 U. S. 545, 30 L. Ed. 257; **Baltimore & O. R. Co. v. Henthorne**, 73 Fed. 634, 641 (C. C. A. 6)—opinion by Judge Taft.

As we read **Goodhart v. Pennsylvania R. Co.**, 177 Pa. 1, 35 A. 191, relied upon by petitioner, it does not hold con-

trary to the rule of admissibility because there the annuity did not, as in this case, represent the present cash value of the earnings or contributions.

2. In defining damages the Court charged the jury that they were "the present cash value of plaintiff's pecuniary loss, which is the amount you award" (R. p. 562). This charge more than abundantly protected petitioner. **Louisville & N. R. Co. v. Holloway**, 246 U. S. 525, 62 L. Ed. 867; **Western & A. R. Co. v. Hughes**, 278 U. S. 496, 73 L. Ed. 473. The objection to the evidence of the cost of an annuity was general, but the court voluntarily stated in overruling the objection that the testimony was not controlling but could merely be considered (R. pp. 285-86). When an objection is thus general and the testimony is admissible for any purpose, no matter how limited, it is not error to receive it. **Pennsylvania Co. v. Sheeley**, 221 Fed. 901 (C. C. A. 6); **Erie R. Co. v. Shomer**, 171 Fed. 798 (C. C. A. 6); **Hollweg v. Schaefer Brokerage Co.**, 197 Fed. 689 (C. C. A. 6); **Burton v. Driggs**, 20 Wall. 125.

3. In actions under the Federal Employers Liability Act, rulings on the admissibility of evidence are normally left to the sound discretion of the trial judge, and since there is ample evidence to support the jury's verdict apart from the testimony as to an annuity complained of, it is not necessary for this Court to determine whether the discretion of the trial judge was abused. **Lavender v. Kurn**, 327 U. S. 645, 654, 90 L. Ed. 916, 923.

4. Error in the admission of testimony as to the annuity, if any, was at best technical error not affecting the substantial rights of the parties, and therefore would not, under the "harmless error statute" (Sec. 269 of the Judicial Code as amended; 28 U. S. C. A., Sec. 391; Act of February 26, 1919, c. 48, 40 Stat. 1181) form the basis of review and reversal by this Court. See extended discus-

sion of the scope and application of the "harmless error statute" in a civil case in Petition for Certiorari and Supporting Brief, filed herein by respondent as petitioner.

CONCLUSION.

Since there is no showing by petitioner that this Court should disturb the concurrent findings of the District Court and the Circuit Court of Appeals that the release executed by Ervin Camp should be rescinded because of mutual mistake of fact on the part of Camp and his employer, since the legal basis for such rescission is plain, since there was no error in the admission of evidence of the charge made by an insurance company for an annuity without refund which can form the basis of review and reversal herein, and since the questions raised by the petitioner are unsubstantial, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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